



COPY

April 21, 2016

VIA HAND DELIVERY

Mr. Byron L. Diamond
Director of Administrative Services
Room 1315
State Capitol
P.O. Box 94664
Lincoln, NE 68509-4664

RE: Protest by AmeriHealth Nebraska, Inc. d/b/a Arbor Health Plan relating to Request for Proposal (RFP) 5151Z1 – Intent to Award dated March 8, 2016

Dear Director Diamond:

In accordance with Nebraska Administrative Services Materiel Division – State Purchasing Bureau Standard Protest/Grievance Procedures for Vendors, this letter will serve as AmeriHealth Nebraska, Inc. d/b/a Arbor Health Plan's ("Arbor Health's") request (this "Request") for a meeting with you and Nebraska Department of Administrative Services – Materiel Division Administrator Bo Botelho (the "Meeting") regarding the Intent to Award Contracts posted March 8, 2016 (the "Award") relating to Request for Proposal 5151Z1 (the "RFP"). By letter dated March 22, 2016 (the "Protest"), Arbor Health timely protested the Award. The Nebraska Department of Administrative Services State Purchasing Bureau ("SPB") responded to Arbor Health's Protest by letter signed by Administrator Botelho dated April 7, 2016 (the "Response"). The Response denied Arbor Health's protest.

Arbor Health's grievance as set forth in the Protest has not been properly addressed. The Protest and the arguments set forth therein are hereby incorporated in this Request by this reference. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Protest.

The specific issues to be addressed at the Meeting are as follows: (1) the Reevaluation was contrary to Nebraska law and did not remedy the legal deficiencies in the RFP and scoring process; (2) the statutory and regulatory factors required to be considered in awarding contracts under the RFP have not been properly considered; and (3) even if the scoring criteria had allowed for the proper considerations and been properly implemented from the outset, the lack of proper control and oversight over the scoring process resulted in an arbitrary award. As a result of these issues, the Award was not to the "lowest responsible bidder" and was contrary to Nebraska law. Notably, because Arbor Health has only recently received responses from the Nebraska Department of Health and Human Services ("DHHS") to multiple document requests, it therefore requests that the Meeting be held after it has had sufficient time to review and analyze such responses. Arbor Health reserves the right to amend and/or supplement this Request and the issues set forth herein in light of its continuing review of the responses to its document requests, as referenced above.



The points of contact for purposes of this Request and the underlying Protest are Thomas J. Culhane and William T. Foley, Erickson | Sederstrom, P.C., L.L.O., 10330 Regency Parkway Drive, Suite 100, Omaha, Nebraska 68114. You may also call Mr. Culhane or Mr. Foley at 402-397-2200 or e-mail them at tculh@eslaw.com and wfoley@eslaw.com, respectively.

ARGUMENT

Arbor Health is submitting this Request because the Response failed to redress Arbor Health's grievances, as set forth in the Protest. The arguments made and positions taken by SPB in the Response are internally inconsistent and inconsistent with Nebraska law. Many of the deficiencies in the RFP and evaluation procedure raised in Arbor Health's Protest were not addressed in the Response.

SPB implied in the Response that the protesting bidders, including Arbor Health, are not concerned with the wellbeing of the citizens of the State of Nebraska. Arbor Health takes exception to that implication. In the Response, SPB argued, "[t]he State is a fiduciary to its citizens and represents their best interests, whereas a bidder is a fiduciary unto itself and represents its own pecuniary interests. Thus, the State is always in the best position to determine what best benefits the State and its citizens." Response, p. 1. Arbor Health's dedication to the wellbeing of Nebraska citizens has been demonstrated through Arbor Health's long term provision of professional, compassionate and responsive Medicaid services to those citizens.

Moreover, even accepting as true SPB's assertion that the State is in the best position to determine what best benefits the State and its citizens, that does not mean that the State will arrive at the correct conclusion, or act in conformity with applicable Nebraska law. The protest process is specifically designed to allow bidders to ensure that the State acts in the best interests of the State and its citizens and raise any concerns related thereto.

In fact, the Award suggests that the State, acting in the best interests of its citizens, is not concerned that one of the selected providers was found unfit to provide Medicaid services in the State of Iowa because of misconduct related to the procurement of a similar Medicaid contract, and another terminated its relationship with the Commonwealth of Kentucky under a similar Medicaid contract without cause, costing Kentucky and its taxpayers unknown sums, apparently due to financial motivations. If the State believes awarding contracts to these providers is in the best interest of the State and its citizens, Arbor Health strongly disagrees.

I. SPB USED THE INCORRECT STANDARD IN ADDRESSING THE ARGUMENTS RAISED IN THE PROTEST.

In the Response, SPB maintains that "[t]he protests confuse the proper legal standard for contract procurement in Nebraska." Response, p. 4. However, it is SPB that, after setting out the



correct standard, proceeded to confuse it. Specifically, SPB correctly asserted that in Nebraska, if an "...administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body." *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004) (emphasis added).

SPB then stated "nothing raised in the protests provide [sic] any showing that the State acted arbitrarily from favoritism, ill will, fraud, collusion or other such motives." (emphasis added). See Response, p. 4. This second recitation of the standard omits the word "or," implying that the State's action must have been arbitrary *and* with one of the listed motives in order to be found improper, thereby applying an incorrect standard. SPB's first recitation of the standard, rather than the one it applied, was the correct one. Although not cited in the Response, it is a fundamental principle of Nebraska law that State administrative agencies cannot act in an arbitrary or capricious manner. *Pierce v. Douglas County Civil Service Com'n*, 275 Neb. 722, 729, 748 N.W.2d 660, 666 (2008). That the State's action was arbitrary in making the Award provides a sufficient basis to overturn the Award, and it was.

II. SPB AND DHHS WERE REQUIRED BY NEBRASKA LAW TO COMPLY WITH THE MANUAL IN CONNECTION WITH THE RFP, AND EVEN IF THEY WERE NOT, THE FAILURE TO DO SO WAS ARBITRARY.

In the Protest, Arbor Health pointed out that the State failed to conduct the RFP and the Reevaluation in compliance with the DAS State Purchasing Bureau's Agency Procurement Manual for Services (the "Manual") in several particulars, including, without limitation, failing to (1) evaluate the RFP according to the stated criteria; (2) develop and submit the evaluation criteria with the requisition; (3) develop the evaluation criteria simultaneously with the requirements of the RFP; (4) ensure that all evaluators had a clear understanding of the scoring process and how points are assigned based on the evaluation criteria; (5) form an evaluation framework that provided the agency with a common standard by which to judge the merit of the competing proposals; and (6) offer bidders a fair basis of comparison. In response to these arguments, SPB maintained in the Response that the Procurement Manual for Services does not have the authority of law, rule or regulation. But this contradicts SPB's interpretation of the applicable law, as specifically set forth in the Manual:

"Neb. Rev. St. §§ 73-501—73-510 requires agencies to use a standardized, open, and fair process for the selection of contractual services. Service procurements in excess of \$50,000 shall be bid in the manner prescribed in this Agency Procurement Manual for Services." Manual, p. 3. It is therefore clear that SPB's published interpretation of the applicable statutes, including Neb. Rev. St. § 73-504(2), is inconsistent with SPB's position in the Response. Specifically, SPB previously interpreted the applicable statutes to require compliance with the Manual.



Even ignoring the State's clear interpretation of Neb. Rev. St. § 73-504(2) as requiring compliance with the Manual, and accepting the statement in the Response that the Manual does not have the authority of law, rule or regulation, it was arbitrary for the State to vary from the procedures set forth in the Manual. As indicated above, state statutes require agencies to use a standardized, open and fair process for the selection of contractual services. The Manual sets forth the procurement processes established by SPB in order to facilitate the procurement of services for state agencies. See Manual, p. 3. It was arbitrary for SPB to develop processes for procurements that meet statutory requirements, publish them in the Manual, make the Manual available to state agencies, the public and the bidders in connection with the RFP, and then conduct the RFP other than as provided in the Manual.

SPB further maintained in the Response that "[t]he State does not believe that process [set out in the Manual] was deviated from in this bid; ..." See Response, p. 3. This statement was offered without any supporting facts, analysis or even any response regarding the deviations noted by Arbor Health from the procedures set forth in the Manual.

SPB did not directly address Arbor Health's contention that SPB failed to comply with the Manual in certain respects. From the Response and from SPB's prior correspondence, it is clear that the variations took place, and were intentional. In the Response, SPB maintained, "Evaluators are expected to use their individual training, experience and judgment to assign points to a submission." See Response, p. 3. In its response to Arbor Health's protest of the initial award of contracts issued February 5, 2016 (the "Prior Award"), SPB maintains, "multiple evaluators are used to provide a range of independent evaluations." See response to protest of Initial Award, dated March 1, 2016, signed by then-current Nebraska Department of Administrative Services – Materiel Division Administrator Marilyn Bottrell, p. 1. SPB explained its position further in its response to the protest to the Prior Award filed by WellCare of Nebraska: "Multiple evaluators are used to provide a range of subjective opinion. Inconsistencies are expected and desired, based upon the opinion of the evaluator. The integrity of the process is not to guide the scoring, but to allow it to occur on the basis of an independent subjective evaluation." See WellCare Response, p. 2. Unfortunately, a "range of subjective opinion" based upon each evaluator's "individual training, experience and judgment" does not set up any sort of "common standard" or "fair basis of comparison" as required by the Manual. Moreover, this demonstrates that rather than ensuring that the evaluators had a clear understanding of the scoring process and how points are assigned based on the evaluation criteria, DHHS and SPB intended the evaluators to rely on their own individual experience and opinions, not on any common standard.

The lack of any common standard or fair basis of comparison is further demonstrated by SPB's position regarding the process of the Reevaluation. SPB first argued that the Reevaluation "did not materially or substantially change the scoring criteria" and that it "did not change the total points allowed" or the points allowed for the subcategories. Response, p. 2. SPB argued that the original scoring ratio was maintained. *Id.* Apparently based on its incorrect position that the changes were not material or substantial, SPB found "no prejudice or advantage was gained by



any bidder as the total points did not change, nor did the weight given to any section change.” *Id.* But this is not the correct standard. As indicated previously, the standard is whether the action was arbitrary – which it was.

If SPB were correct that the Reevaluation worked no material or substantial change to the scoring criteria, and had there been any common standard or fair basis of comparison as required by the Manual, the awarded bidders would not have changed in connection with the evaluation. But they did. Moreover, SPB tacitly acknowledged the arbitrariness of the scoring system by pointing out that the second set of evaluators was more consistent overall in scoring the Corporate Overview than the first set of evaluators. This variation in the level of consistency, and in the results, was expected, given that SPB intended each evaluator to rely on such evaluator’s individual training, experience and judgment. For that reason, no two groups of evaluators would come to the same or even a similar result. This was borne out concretely by the conduct of the Reevaluation, which resulted in different levels of consistency and different results.

A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. *In re Proposed Amendment to Title 291, Chapter 3, of the Motor Carrier Rules and Regulations*, 264 Neb. 298, 310-11, 646 N.W.2d 650, 660 (2002). As SPB has conceded, the intent was for the evaluators to award points based on the evaluators’ own individual training, experience and opinions, not on any basis that would lead a reasonable person to the same conclusion. Empirically, the consistency levels and results reached by the two groups of evaluators differed. There was no common standard or fair basis for comparison. The evaluators did not have a clear understanding of the scoring process and how points were to be assigned based on the evaluation criteria. The Award was arbitrary and should be overturned.

Because it failed to conduct the RFP in compliance with the Manual, SPB’s actions were arbitrary. As provided in *Pierce, supra*, State administrative agencies cannot act in an arbitrary or capricious manner. For that reason, the Award, because arbitrary, was a violation of Nebraska law, notwithstanding SPB’s position to the contrary.

III. DHHS AND SPB FAILED TO PROPERLY CONSIDER THE FACTORS REQUIRED TO BE CONSIDERED IN MAKING THE AWARD.

SPB did not address in the Response Arbor Health’s argument that the RFP and the scoring criteria failed to properly consider the factors that are statutorily required to be considered in awarding bids – the Statutory Factors. SPB merely maintained that DHHS set the point values for the various questions, and DHHS consciously decided that the questions eliciting information on the Statutory Factors would be worth twenty (20) points. SPB maintains, “The agency is in the best position to determine the needs of the agency, to design an RFP to meet those needs, and to evaluate proposals effectively.” Response, p. 2.



Even accepting as true SPB's premise that DHHS is in the best position to do those things, DHHS is not authorized to violate State statutes. Taking SPB's position to its logical extreme, DHHS, being in the best position to make the determination, could make a conscious decision that every bidder should be awarded five (5) points for providing any complete response to the questions related to the Statutory Factors, regardless of the substance of the response. But SPB has already acknowledged that system, which DHHS initially adopted and SPB initially approved, was flawed. In so conceding, SPB acknowledged that merely being in the best position to make the determination and making a conscious decision does not mean DHHS's decision is proper or compliant with Nebraska law.

Similarly, DHHS could consciously decide that information related to the Statutory Factors should be worth twenty (20) points out of two thousand two hundred fifty (2,250), as it has, or ten (10) points, or one (1) point, or one half (.5) point, or one tenth (.1) of a point, or one hundredth (.01) of a point, all the way down to zero (0) points.

The Statutory Factors must be considered, as a matter of Nebraska law. Neb. Rev. St. § 81-161(2); 9 NAC 4-001. By definition, this requires that they be considered in a way that does not render them immaterial to the final determination. While DHHS may be in the best position to make the determination, Nebraska law requires consideration of the Statutory Factors, and the immaterial effect of the Statutory Factors in the evaluation of the RFP rendered it non-compliant with Nebraska law. The Award should therefore be overturned.

SPB further clouds analysis of this issue by arguing that DHHS had prior knowledge of all the issues that were the subject of disclosure by the bidders. Specifically, SPB maintains, "The performance of the various contractors supporting Medicaid across the United States is well known to DHHS. The federal government and the various states share information regarding contractors' performance. Issues in Medicaid also receive significant press coverage. In the instant case, DHHS was aware of all the incidents mentioned in the protests prior to receiving the bids, and was fully aware of the facts and outcomes." Response, p. 3. This argument is apparently intended to respond to the argument that certain bidders' disclosures were incomplete or non-responsive to the RFP, by establishing that notwithstanding the form or completeness of the disclosures actually received, DHHS had proper access to all relevant information.

This position directly contradicts a prior position taken by SPB in the Response. Earlier in the Response, in arguing that Nebraska law does not require consideration of a bidder's incumbency, SPB maintains, "The evaluators can only consider the information provided. It is up to the procuring agency to determine what information is to be elicited from bidders, and thus what information is to be evaluated." Response, p. 3. SPB goes on to say that it is irrelevant whether the evaluators had knowledge of whether a bidder was an incumbent, and it may be preferable for the evaluators to have no such knowledge.



SPB would like to have it both ways: on the one hand, the evaluators can only evaluate the information provided in the RFP, and thus the failure to consider a bidder's incumbency was proper. On the other hand, the completeness of the information disclosed in the RFP and method of disclosure do not matter, because DHHS "was fully aware of the facts and outcomes" related to the bidders' performance of Medicaid contracts. This discrepancy in SPB's position is untenable.

Moreover, SPB indicated that DHHS had institutional knowledge regarding the performance of the bidders in connection with Medicaid contracts and all of the relevant facts and outcomes. There is no indication that DHHS or SPB took any step to ensure that the evaluators had such relevant knowledge in scoring the bids. In fact, as SPB has indicated, the intention was for the evaluators to rely on their individual training, experience and opinions, not on whatever institutional knowledge it claims DHHS may have had. Accordingly, the Response does not properly address Arbor Health's concerns regarding the bidders' ability to minimize the impact of disclosure of negative information.

CONCLUSION

SPB applied the incorrect standard in denying Arbor Health's Protest. The Award should be overturned if it was arbitrary, and as set forth above, it was. Moreover, DHHS and SPB failed to comply with Nebraska law by failing to comply with the Manual and Nebraska statute. The Response failed to address certain arguments raised in Arbor Health's Protest, and did not properly respond to any of the arguments raised. Because Arbor Health's Protest has not been, and cannot be, properly redressed, and the Award was arbitrary and contrary to Nebraska law, the Award should be overturned.

RIGHT TO SUPPLEMENT

Arbor Health reserves the right to supplement this Request and the arguments contained herein as it continues to review the documents produced by DHHS and DAS. Arbor Health requests that the Meeting be set so as to allow sufficient time for Arbor Health to complete such review and analysis.

Sincerely,

A handwritten signature in cursive script that reads "J. Michael Jernigan".

J. Michael Jernigan
President

cc: Mr. Bo Botelho (via hand delivery)